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No. 98-1846

# In the Supreme Court of the United States

MARIE PFAU, PETITIONER

*v.*

WILLIAM REED, DIRECTOR,
DEFENSE CONTRACT AUDIT AGENCY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, preempts petitioner's claims under the Federal Tort Claims Act and Texas state law for intentional infliction of emotional distress.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-39a) is reported at 167 F. 3d 228. The initial opinion of the court of appeals (Pet. App. 9a-33a) is reported at 125 F.3d 927.

### JURISDICTION

The judgment of the court of appeals was entered on February 8, 1999. The petition for a writ of certiorari was filed on May 10, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a former employee of the Defense Contract Audit Agency (DCAA). Pet. App. 10a. Petitioner worked on an audit team where Pete Gonzales was her first-line supervisor. *Ibid.* Petitioner alleges that, when she first became a member of that team, Gonzales made lewd and suggestive comments to her and requested sexually provocative behavior from her. *Ibid.* Petitioner further alleges that Gonzales requested that she take him on a trip with her, made sexual advances she rejected, asked to go on vacations with her at her expense, and asked her for money on several occasions. *Ibid.* Petitioner also alleges that Gonzales called her, appeared at her home, and insisted that they become sexually involved. *Id.* at 11a.

Petitioner alleges that, after she complained to management that Gonzales had sexually harassed her, Gonzales retaliated against her. Pet. App. 11a. Among other things, she alleges that Gonzales gave her inappropriate work assignments, denied her training, and denied her request for sick leave. *Ibid.* Petitioner was ultimately fired from her job. *Id.* at 10a.

2. Petitioner filed suit in the United States District Court for the Western District of Texas against the Director of the DCAA and Gonzales among others. Pet. App. 12a. Petitioner alleged that Gonzales had subjected her to sexual harassment for which the DCAA was liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (42 U.S.C. 1981a). Pet. App. 12a. She also alleged against Gonzales a state law tort claim of intentional infliction of emotional distress. *Ibid.*

The district court dismissed petitioner's claim of intentional infliction of emotional distress. Pet. App. 4a-8a. The court held that Title VII and the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, preempted that claim. Pet. App. 5a-7a. Petitioner amended her complaint to add the United States as a defendant and to assert a claim of intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA). *Id.* at 12a. Petitioner also reasserted her state law tort claim against Gonzales. *Ibid.* The district court dismissed both tort claims, once again relying on the preemptive force of Title VII and the CSRA. *Ibid.* The court then granted summary judgment in favor of the government on petitioner's Title VII claim, *id.* at 13a, holding that Gonzales did not qualify as petitioner's "employer" for purposes of imputing liability to the DCAA under Title VII, and that petitioner's evidence failed to raise an inference that DCAA had actual or constructive knowledge of Gonzales's alleged harassment prior to petitioner's formal complaint or that it had failed to take appropriate action following the complaint. See *id.* at 20a.

3. The court of appeals affirmed. Pet. App. 9a-33a. The court held that, under circuit precedent, "[w]hen the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim." *Id.* at 15a. Finding that the same set of facts supported petitioner's Title VII claim and her intentional infliction of emotional distress claims, the court concluded that Title VII preempted petitioner's intentional infliction of emotional distress claims. *Id.* at 15a-18a. The court rejected petitioner's contention that her tort claims are distinct from her Title VII claim, because some of the

alleged conduct occurred away from the office and after business hours. *Id.* at 16a. The court explained that, under *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), those factual allegations support her Title VII claim. Pet. App. 16a.

The court of appeals also upheld the district court's grant of summary judgment dismissing petitioner's Title VII claim. Pet. App. 18a-33a. The court held that Gonzales was not petitioner's "employer" for purposes of Title VII under existing precedent, *id.* at 21a-26a, and that petitioner's evidence raised no genuine issue of material fact with regard to DCAA's knowledge of the alleged harassment prior to petitioner's formal complaint or the adequacy of its response following the complaint, *id.* at 26a-33a.

4. Petitioner sought certiorari, and this Court granted the petition, vacated the court of appeals' judgment, and remanded the case for further consideration in light of the intervening decisions in *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Indus., Inc.* v. *Ellerth*, 118 S. Ct. 2257 (1998). 119 S. Ct. 32 (1998). Those cases established the standards governing employer liability under Title VII for harassment committed by a supervisor.

On remand, the court of appeals reinstated the part of its prior opinion concerning Title VII's preemption of petitioner's claims of intentional infliction of emotional distress and reaffirmed the dismissal of those claims. Pet. App. 38a-39a. The court remanded petitioner's Title VII sexual harassment claim for further consideration and fact-finding by the district court, in light of *Faragher* and *Ellerth*. *Id.* at 39a.

## ARGUMENT

1. Petitioner seeks review of the court of appeals' holding that Title VII preempts her claims under the Federal Torts Claims Act (FTCA) and Texas state law for intentional infliction of emotional distress. Because the court of appeals remanded the case for consideration of petitioner's Title VII claim, however, the case is in an interlocutory posture. This Court ordinarily refuses to grant review when the decision being challenged is interlocutory. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

There is no reason to depart from the Court's usual practice here. Petitioner's challenge to the court of appeals' preemption ruling depends on her assertion that her claims involving intentional infliction of emotional distress are distinct from her Title VII claim. The court of appeals' remand order contemplates additional discovery and fact-finding on her Title VII claim that could cast further light on its relationship to her claims of intentional infliction of emotional distress. Such facts could provide additional support for the court of appeals' conclusion that all of the alleged conduct falls within petitioner's Title VII claim, or could cause the court to revisit that conclusion. If a live dispute persists on that issue after remand, petitioner will retain her right to present to this Court any claim she presents here so long as she has preserved it. See,

*e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

2. Even if petitioner's challenge to the court of appeals' preemption ruling were ripe, it would not warrant review. In *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The court of appeals in this case interpreted that holding to mean that "[w]hen the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim." Pet. App. 15a. Finding that the same set of facts supported petitioner's Title VII claim and her intentional infliction claims, the court concluded that Title VII preempted petitioner's intentional infliction claims. *Id.* at 14a-18a.

a. Petitioner contends (Pet. 9-11) that some of the factual allegations upon which she relies to support her intentional infliction claims do not support her Title VII claim. That fact-bound challenge to the decision below does not raise any issue of general importance and therefore does not warrant review.

In any event, the court of appeals correctly concluded that all of petitioner's allegations would be relevant in establishing a Title VII claim. Petitioner contends (Pet. 9) that some of the factual allegations upon which she relied to support her intentional infliction claims are not relevant to her Title VII claim, because they do not involve "sexual" conduct. Those allegations are that Gonzales requested money from petitioner, sought joint vacations with her, and made phone calls to her house. Title VII, however, does not require proof that harassing conduct is of a sexual nature. Rather, "any harassment or other unequal treatment of an employee or

group of employees that would not occur but for the sex of the employee or employees may, if sufficiently severe or pervasive, comprise an illegal condition of employment under Title VII." *McKinney* v. *Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985); see also *Hall* v. *Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) ("[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances"); *Hicks* v. *Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) ("evidence of threats of physical violence and incidents of verbal abuse" would be considered along with evidence of sexual harassment in determining hostile work environment claim).

Applying that standard, Gonzales's alleged money requests, vacation demands, and phone calls are relevant to petitioner's Title VII claim. Those incidents allegedly occurred during the same time period that Gonzales engaged in repeated sexual advances, made lewd and suggestive comments, and demanded sexual relations. Pet. App. 10a-11a. Whether or not the incidents were non-sexual, they could help to establish that petitioner was subjected to a pattern of harassment that would not have occurred but for her sex and that was sufficiently severe and pervasive to affect the terms and conditions of her employment. The court of appeals therefore correctly concluded that those incidents are relevant to petitioner's Title VII claim.

Petitioner also contends (Pet. 10) that some of the conduct upon which she relies for her intentional infliction claims is not relevant to her Title VII claim, because it occurred after work hours, outside of work premises. When a supervisor harasses a subordinate after work hours and outside work premises, however, it can have a substantial effect on the way that employee experiences her working environment. Such

evidence is therefore relevant in establishing a Title VII hostile work environment claim. See *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 60 (1986) (plaintiff's allegation that her supervisor invited her to dinner, suggested at dinner that they go to a motel for sexual relations, and made repeated demands for sexual favors both during and after business hours, formed part of the basis for a Title VII sexual harassment claim).

In sum, all of the evidence upon which petitioner relies for her intentional infliction claims is also relevant to her Title VII claim. Petitioner's contention to the contrary is without merit.

b. Petitioner also contends (Pet. 7, 12-15) that the court of appeals' "same facts" test is not the correct standard for judging the preemptive force of Title VII, and that it conflicts with Ninth Circuit decisions holding that Title VII does not preempt FTCA and state law causes of action that involve a "highly personal violation beyond the meaning of discrimination." *Brock* v. *United States*, 64 F.3d 1421, 1424 (1995); see also *Arnold* v. *United States*, 816 F.2d 1306, 1311-1312 (1987); *Otto* v. *Heckler*, 781 F.2d 754, 756-758 (1986). For several reasons, that contention does not warrant review in this case.

First, only the Fifth and Ninth circuits have addressed the extent to which Title VII preempts FTCA and state law tort claims. That issue would benefit from further ventilation in the regional courts of appeals.

Second, the Ninth Circuit's decisions have all involved particularly aggravated forms of conduct; in no case has the sole claim been one of intentional infliction of emotional distress. *Brock*, 64 F.3d at 1421 (rape and assault); *Arnold*, 816 F.2d at 1312 (assault, battery, and

false imprisonment); *Otto*, 781 F.2d at 755, 757-758 (stalking and placing in fear of sexual assault resulting in a miscarriage). It is unclear whether the Ninth Circuit would conclude that intentional infliction of emotional distress without more is the kind of "highly personal violation beyond the meaning of discrimination" that is not preempted by Title VII.

Third, all of the Ninth Circuit cases involved claims based on conduct that predated the 1991 amendment to Title VII, which provides that victims of intentional discrimination may seek compensatory relief. The 1991 amendment was intended to afford the victims of sexual harassment compensation for injuries to "their mental, physical, and emotional health, to their self-respect and dignity, and for other consequential harms." 137 Cong. Rec. 30,661 (1991) (section-by-section analysis of Rep. Edwards). As a result of that amendment, Title VII now provides compensation for the same kinds of injuries that are alleged as a basis for claims of intentional infliction of emotional distress. The Ninth Circuit has previously held that Title VII preempted a state law tort suit for defamation when the plaintiff sought compensation for the same "injuries cognizable and remediable under Title VII." *Otto*, 781 F.2d at 757. In light of the 1991 amendment, the Ninth Circuit may reach a similar conclusion with respect to Title VII's effect on the tort of intentional infliction of emotional distress.

Fourth, in deciding the preemption question, the Ninth Circuit did not have the benefit of this Court's decisions in *Faragher* and *Ellerth* establishing the principles that govern the extent to which an employer is liable under Title VII for harassment committed by a supervisor. Because those decisions help to define the

reach of Title VII, they may also affect the scope of Title VII's preemptive effect.

Finally, employer liability decisions in the wake of *Faragher* and *Ellerth* may reduce the practical importance of the preemption question, particularly in conjunction with the 1991 amendment. Since plaintiff employees can more readily establish employer liability for supervisory harassment and can now obtain compensatory relief for a violation, they have less incentive than before to pursue FTCA and state law tort claims. Experience under the new rules for determining employer liability for supervisory harassment is necessary before an assessment can be made concerning the continuing importance of the preemption issue.

For all these reasons, the question concerning the correct legal standard for determining Title VII's preemptive effect on FTCA and state tort law therefore does not warrant review in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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